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# Yellow Peril Turns to Brown: Did Judicial Xenophobia Color *INS v. Delgado*

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## YELLOW PERIL TURNS TO BROWN: DID JUDICIAL XENOPHOBIA COLOR *INS* v. *DELGADO*?

### I. INTRODUCTION

Immigration law reform and enforcement are among the most pressing concerns currently facing the United States government. Although immigration problems have sparked substantial legislative debate and several potential solutions have been proposed, no comprehensive plan has yet been enacted which meets all the demands of this complex issue. The formulation of such a plan becomes increasingly more crucial. As Senator Edward M. Kennedy has noted:

At no time in recent years has the opportunity for action on immigration proposals been more hopeful, or the consequences of inaction more dangerous. Unless we are vigilant, the reforms of the past may be eroded by the anti-immigration sentiment spreading across the land.<sup>1</sup>

This xenophobia among the populace has grown more apparent as inadequacies in immigration policies become more difficult to ignore.<sup>2</sup> Less apparent, but of far greater concern to those who hope to effect prompt and lasting immigration reform, is the tendency of some government officials to allow the pressure of popular anti-alien sentiment to color acts of the federal government.

Two recent decisions by the United States Supreme Court<sup>3</sup> may indicate a willingness on the part of a majority of the Court to shore up weaknesses in current immigration laws at the price of abridged constitutional freedoms. While one of the decisions is at least arguably based upon purely procedural grounds,<sup>4</sup> the plurality opinion in *INS* v. *Delgado*<sup>5</sup> represents perhaps the clearest example to date of the Burger Court's approval of the systematic limitation of constitutional protec-

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1. Kennedy, *Foreword*, 19 SAN DIEGO L. REV. 1, 1 (Dec. 1981).

2. The overwhelming (70.5% to 29.5%) voter support for Proposition 38, a 1984 advisory measure calling for the prohibition of languages other than English on California election materials, is but one indication of strong anti-immigrant sentiments among the American populace.

3. *INS* v. *Lopez-Mendoza*, 104 S. Ct. 3479 (1984) (holding exclusionary rule not applicable in deportation proceedings); *INS* v. *Delgado*, 104 S. Ct. at 1758 (1984) (holding that *INS* factory surveys do not constitute seizures under the fourth amendment).

4. *Lopez-Mendoza*, 104 S. Ct. at 3484-85. The Court's refusal to apply the exclusionary rule in deportation hearings was based upon its characterization of such proceedings as civil in nature, while the exclusionary rule is applicable only in criminal proceedings. *Id.*

5. 104 S. Ct. 1758 (1984).

tions in favor of more efficient law enforcement procedures. Whether this approval flows from a simple judicial pragmatism or from the Justices' personal xenophobic sentiments, its effect is to curtail the fundamental freedoms of citizens and aliens alike.<sup>6</sup>

This Note will examine the manner in which each contributing Justice applied the relevant legal precedents to the facts of *Delgado*. It will demonstrate that the majority ignored important threshold inquiries, distorted the factual record and misapplied precedent in order to reach its desired conclusion. It will suggest that the Court's result-oriented decision effectively approves the systematic violation of Mexican-American citizens' rights. It will then conclude with a brief prognosis for the future of constitutional freedoms under a Court willing to fashion—at such a cost—judicial remedies for problems better left to the Congress.

## II. STATEMENT OF THE CASE

At issue in *INS v. Delgado* were three factory surveys (raids) conducted by the Immigration and Naturalization Service (INS) in two Southern California garment factories in 1977.<sup>7</sup> The first two surveys were conducted pursuant to warrants issued on a showing of probable cause to believe that illegal aliens were employed on the premises, although no particular suspected aliens were named in either of the warrants.<sup>8</sup> The third survey was conducted at another garment factory without a warrant but with the consent of the factory owner.<sup>9</sup>

At the beginning of each survey INS agents stationed themselves at building exits to prevent workers from leaving the workplace before being questioned.<sup>10</sup> Other agents then circulated throughout the workforce, questioning workers regarding their citizenship.<sup>11</sup> All of the

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6. The fourth amendment protects lawful resident aliens as well as United States citizens. *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

7. *Delgado*, 104 S. Ct. 1758, 1760 (1984).

8. These searches were conducted at Southern California Davis Pleating Company. *Id.*

9. The warrantless search took place at a factory called Mr. Pleat. *Id.* Neither the Ninth Circuit nor the Supreme Court ruled on the constitutionality of a search justified merely by the factory owner's consent. The circuit court noted that it need not reach this issue because it had determined that the INS' conduct during the surveys violated the workers' fourth amendment rights. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 629 (9th Cir. 1982), *rev'd sub nom. INS v. Delgado*, 104 S. Ct. 1758 (1984). Justice Brennan, dissenting, was the only Supreme Court Justice to address this issue. He commented that the employer's consent to the INS' entry into the factory "does not mean that the workers' expectation of privacy [in their workplace] evaporates." *Delgado*, 104 S. Ct. at 1774 (Brennan, J., dissenting).

10. 104 S. Ct. at 1760, 1763-64. *See also id.* at 1770 (Brennan, J., dissenting in part).

11. *Id.* at 1760.

agents wore badges and were armed, but their weapons were not drawn. The workers were asked from one to three questions relating to their citizenship. If these questions were answered satisfactorily, the agents moved on to question other employees. If, however, a worker gave an unsatisfactory response or admitted that he was an alien, he was asked to show his identification papers.<sup>12</sup> Arrests were made when officials had probable cause to suspect that a worker was an illegal alien and when workers were apprehended attempting to flee or hide from the INS agents.<sup>13</sup> The three surveys yielded seventy-eight, thirty-nine and forty-five arrests respectively.<sup>14</sup>

Respondents, two U.S. citizens and two permanent resident aliens, were among those questioned during the surveys.<sup>15</sup> In 1978 the respondents and their union, the International Ladies' Garment Workers' Union, filed two actions in district court challenging the constitutionality of INS factory surveys and seeking declaratory and injunctive relief.<sup>16</sup> The district court denied class certification and dismissed the union from the suit.<sup>17</sup> On a series of cross-motions for summary judgment the district court granted judgment for the INS, ruling that respondents had no reasonable expectation of privacy in their workplace and therefore had no standing to challenge the constitutionality of the INS' entry.<sup>18</sup> The court further held that none of the respondents had been detained within the meaning of the fourth amendment at any time during the factory surveys.<sup>19</sup>

The Court of Appeals for the Ninth Circuit reversed the district court's decision.<sup>20</sup> Applying the standard enunciated by Justice Stewart in his plurality opinion in *United States v. Mendenhall*,<sup>21</sup> the Ninth Circuit concluded that the entire workforce of the factory had been seized

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12. *Id.* at 1760-61.

13. *Id.* at 1770 (Brennan, J., dissenting).

14. *International Ladies' Garment Workers' Union*, 681 F.2d at 627. The forty-five workers arrested at Mr. Pleat constituted approximately one half of that factory's workforce. *Id.*

15. *Delgado*, 104 S. Ct. at 1761 n.1.

16. The two actions, filed in the United States District Court for the Central District of California, were later consolidated. *Id.* at 1761.

17. The district court found that the Union had no standing to join as a party to the action. *Id.*

18. *Id.*

19. *Id.*

20. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982), *rev'd sub nom. INS v. Delgado*, 104 S. Ct. 210 (1984). The court of appeals ruled that the district court had not abused its discretion in denying class certification, but declined to resolve the issue of whether the Union had standing to raise its members' fourth amendment claims. *Id.* at 645 n.24.

21. "A person has been 'seized' within the meaning of the fourth amendment only if, in

for the duration of the survey. The court reasoned that the agents stationed at the factory exits would cause a reasonable worker to believe that he was not free to leave.<sup>22</sup> The court further held that, under the fourth amendment, an individual employee could be questioned only on the basis of a reasonable suspicion that the individual was an illegal alien.<sup>23</sup> Because no such suspicion existed as to the individual respondents, the court ruled that the agents' questioning of them violated their fourth amendment rights.<sup>24</sup>

The United States Supreme Court granted certiorari to review the decision of the Ninth Circuit,<sup>25</sup> noting that the lower court decision had "serious ramifications for the enforcement of immigration laws."<sup>26</sup> The Court further explained its decision to grant certiorari by citing a conflicting opinion in the Third Circuit.<sup>27</sup>

### III. LEGAL FRAMEWORK

Fourth amendment protection against unreasonable searches and seizures applies not only to full custodial arrests, but also to brief detentions short of arrest.<sup>28</sup> Where a seizure is custodial, an articulation of probable cause for the arrest of the individual is required.<sup>29</sup> Where, however, the detention does not rise to the level of a traditional arrest, the detention still may be upheld on facts that do not constitute probable cause to arrest.<sup>30</sup>

#### A. Investigative Interrogation

The Supreme Court has identified two distinct types of sub-arrest detentions which are relevant to its analysis in *INS v. Delgado*:<sup>31</sup> the

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view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).

22. *International Ladies' Garment Workers' Union*, 681 F.2d at 634.

23. *Id.* at 639-45.

24. *Id.* at 643.

25. 461 U.S. 904 (1983).

26. 104 S. Ct. at 1762.

27. The Court referred to *Babula v. INS*, 665 F.2d 293 (3d Cir. 1981), as presenting a conflict with the Ninth Circuit's decision in *Delgado*. *Delgado*, 104 S. Ct. at 1762.

28. *Michigan v. Summers*, 452 U.S. 692 (1981); *Brown v. Texas*, 443 U.S. 47 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio*, 392 U.S. 1 (1968).

29. A custodial seizure is one that is substantially similar to a full-blown arrest but does not include formal charging. *Dunaway v. New York*, 442 U.S. 200 (1979).

30. *See, e.g., Florida v. Royer*, 460 U.S. 491 (1983); *Brown v. Texas*, 443 U.S. 47 (1979); *Davis v. Mississippi*, 394 U.S. 721 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968).

31. Also relevant to the Court's analysis is its long-standing recognition that Congress has plenary power to regulate the admission and exclusion of aliens, *see Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *United States v. Brignoni-*

investigative interrogation and the border stop. The investigative interrogation<sup>32</sup> was first recognized by the Court in its examination of an investigatory "stop and frisk" in *Terry v. Ohio*.<sup>33</sup> In that case a police officer watched while Terry and another man suspiciously paced back and forth in front of a store window and then joined up with a third man a few blocks away. The officer approached the three men, identified himself as a policeman and asked them their names. When the officer received an unsatisfactory response he grabbed Terry, searched his outer clothing, and found a pistol inside his jacket pocket. After ordering the men into a nearby store, the officer patted down the other two men and found a second gun in one man's coat pocket. Only after this second weapon had been found were the two men carrying guns arrested.<sup>34</sup>

At trial,<sup>35</sup> the defense moved to suppress the guns as the fruit of an illegal search and seizure. The trial court denied the motion and the two men were convicted.<sup>36</sup> The Supreme Court affirmed, but noted that the fourth amendment applies to "stop and frisk" procedures as well as to full-blown searches and arrests.<sup>37</sup> Holding that a seizure exists "whenever a police officer accosts an individual and restrains his freedom to walk away," the Court found that the officer had seized Terry when he took hold of him and patted down his outer clothing.<sup>38</sup> It further explained that the best test for determining the reasonableness of a particular search or seizure is to balance "the need to search or seize against the invasion which the search or seizure entails."<sup>39</sup> To support an investigative seizure, the Court held that probable cause to arrest is not required. However, some objective justification is necessary: "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that

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Ponce, 422 U.S. 873, 884 (1974), and that—despite the breadth of this Congressional power—it "cannot diminish the fourth amendment rights of citizens who may be mistaken for aliens." *Brignoni-Ponce*, 422 U.S. at 884.

32. Although there are a number of investigative techniques which may be used in the course of such a detention, the investigatory stop generally takes place on the street or in some other public place, and most commonly involves both a request for identification and some inquiry concerning the suspicious conduct of the person detained. See generally 3 W. LAFAVE, SEARCH AND SEIZURE § 9.2 (1978).

33. 392 U.S. 1 (1968).

34. *Id.* at 7.

35. Terry and Chilton, the man upon whom the second gun was found, were prosecuted for carrying concealed weapons. *Id.*

36. *Id.* at 8.

37. *Id.* at 16.

38. *Id.*

39. *Id.* at 21 (citing *Camara v. Municipal Court*, 387 U.S. 523-37 (1967)).

intrusion."<sup>40</sup>

In *Brown v. Texas*,<sup>41</sup> the Court applied the *Terry* rule to an officer's demand for a citizen's identification. Two policemen observed Brown walking away from another man in an alley in an area with a high incidence of drug traffic. The officers stopped Brown and demanded that he identify himself and explain what he was doing.<sup>42</sup> When Brown refused to answer, he was arrested for violating a Texas statute which made it a criminal act for a citizen to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information."<sup>43</sup>

At trial, Brown unsuccessfully asserted that this statute violated the first, fourth and fifth amendments and was unconstitutionally vague.<sup>44</sup> However, the Supreme Court reversed Brown's conviction, finding that the officers had seized him when they detained him for the purpose of requiring him to identify himself.<sup>45</sup> The Court explained that the reasonableness of a seizure which is less intrusive than a traditional arrest depends upon a balance between the public interest and the individual's right to freedom from arbitrary interference by law officers.<sup>46</sup> Accordingly, it held that an investigative interrogation must either be based on specific, articulable suspicion or be performed according to some plan which places neutral limitations on individual officers' conduct.<sup>47</sup>

The Court distinguished *Brown* in *United States v. Mendenhall*.<sup>48</sup> In *Mendenhall*, the Court found that the defendant's fourth amendment rights were not violated when two Drug Enforcement Administration (DEA) agents approached her in an airport concourse, asked her for identification and requested that she accompany them to the airport DEA office for further questioning. Once inside the office, Mendenhall was asked if she would consent to a search of her person and handbag.<sup>49</sup>

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40. *Id.* at 21.

41. 443 U.S. 47 (1979).

42. *Id.* at 49.

43. *Id.* "A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." TEXAS PENAL CODE § 38.02 (Vernon 1974).

44. *Brown*, 443 U.S. at 49-50.

45. *Id.* at 50.

46. *Id.*

47. *Id.* at 51 (citing *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 558-62 (1976)).

48. 446 U.S. 544 (1980).

49. *Id.* at 548, 555. The agents initially approached Mendenhall because her behavior upon arriving at the airport fit their "drug courier profile," an informally compiled set of characteristics considered by the DEA to be typical of persons carrying illegal drugs. *Id.* at 547 n.1. Their suspicions were enhanced when they noted that the name on her airline ticket did not match that on her driver's license. *Id.* at 548.

She replied, "Go ahead," and handed her purse to a DEA agent. Mendenhall then accompanied a DEA agent into an adjoining room, where she disrobed, removed a package of heroin from her undergarments and handed the package to the agent.<sup>50</sup>

At her trial for possession of heroin, Mendenhall moved to suppress the evidence obtained during the search. The trial court ruled that Mendenhall had accompanied the agents to the DEA office voluntarily and that her consent to the search in the office was freely and voluntarily given.<sup>51</sup>

In upholding the trial court's ruling, the Supreme Court enunciated the widely quoted rule that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."<sup>52</sup> The Court then listed various factors which it felt might indicate a seizure even when the detained person did not attempt to leave.<sup>53</sup> Absent at least some of these factors, the Court noted, an officer's otherwise inoffensive encounter with a citizen does not, as a matter of law, implicate the fourth amendment.<sup>54</sup>

The *Mendenhall* test was applied and defined in *Florida v. Royer*,<sup>55</sup> in a plurality opinion upon which the various members of the *Delgado* Court placed substantial, albeit conflicting, emphasis.<sup>56</sup> *Royer*, like *Mendenhall*, concerned an individual who was questioned in an airport concourse by DEA agents.<sup>57</sup> Like Ms. Mendenhall, Mr. Royer showed his driver's license to the officers when they asked for identification, and then produced an airline ticket bearing a name other than the one on the license. Unlike the DEA officers in *Mendenhall*, however, the agents who questioned Royer failed to return his ticket or license, but abruptly picked up Royer's luggage and asked him to accompany them to a small room adjacent to the concourse. Royer did not respond verbally to the

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50. *Id.* at 549.

51. *Id.*

52. *Id.* at 554.

53. The Court's list included "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* (citations omitted). Because none of these factors was present and nothing else in the record indicated that Mendenhall's cooperation with the DEA agents was not purely voluntary, the Court concluded that the evidence obtained during the search was properly admitted at trial. *Id.* at 555-59.

54. *Id.* at 555.

55. 460 U.S. 491 (1983).

56. See *infra* notes 143 & 183-91 and accompanying text.

57. Like Mendenhall, Royer fit the DEA's "drug courier profile." *Royer*, 460 U.S. at 493.



agents' request that he consent to a search of his luggage, but he did unlock one of the suitcases, which was found to contain marijuana. When Royer said that he did not object to having the second suitcase opened, the agents pried it open and discovered more marijuana.<sup>58</sup>

Royer was convicted of possession of marijuana after the trial court denied his motion to suppress the evidence obtained from the search of the suitcases.<sup>59</sup> The Florida District Court of Appeal reversed the conviction.<sup>60</sup> The United States Supreme Court affirmed the appellate court's decision, ruling that Royer had been illegally detained when he consented to the search of his luggage, and that the evidence found inside the luggage, tainted by the illegality of the seizure, was therefore inadmissible.<sup>61</sup>

The Court explained that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual" in a public place, asking him or her if he or she is willing to answer some questions or if he or she is willing to listen; nor would the fact that the officers identify themselves as policemen, in itself, change the consensual nature of the encounter.<sup>62</sup> The Court noted, however, that an individual approached in this manner need not answer any of the questions put to him, and may even decline to listen to the questions and continue on his way.<sup>63</sup> If police are to comply with the fourth amendment's protections, the Court stated, the questioned individual "may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds."<sup>64</sup>

The Court further explained that although probable cause to arrest is not required for every seizure of the person, the scope of any detention not supported by probable cause must be "carefully tailored to its underlying justification."<sup>65</sup> Thus an officer should detain an individual no longer than is necessary to confirm or dispel his suspicions, and should

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58. Royer claimed that he did not know the combination to unlock this second suitcase. *Id.*

59. *Id.* at 495.

60. *Florida v. Royer*, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980), *rev'd*, 460 U.S. 491 (1983).

61. *Royer*, 460 U.S. at 502-08.

62. *Id.* at 499 (citing *Dunaway v. New York*, 442 U.S. 200, 210 n.12 (1979); *Terry v. Ohio*, 392 U.S. 1, 31-34 (1968); *United States v. Mendenhall*, 446 U.S. 544, 555 (1980)).

63. *Id.* at 497-98 (citing *Terry v. Ohio*, 392 U.S. 1, 32-34 (1968)).

64. *Id.* at 498 (citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980)).

65. *Id.* at 500.

use the least intrusive means possible to complete the investigation.<sup>66</sup>

Based upon this reasoning, the Court found that although the officers' initial approach and questioning of Royer did not implicate the fourth amendment,<sup>67</sup> their subsequent detention of him did. As that detention surpassed the limited scope necessary to effectuate the investigation for which the stop was made, the Court held that it violated Royer's rights under the fourth amendment.<sup>68</sup>

### B. Border Stops

The second type of seizure short of traditional arrest relevant to the Court's analysis in *INS v. Delgado* is the border stop, in which officers of the Border Patrol stop a vehicle at or near an international border to question the car's occupants about their citizenship and immigration status. Such a stop, if made at a fixed checkpoint at the border itself, has long been recognized by the Court to be a justifiable intrusion upon motorists' privacy and liberty in the interest of national security.<sup>69</sup> However, when the checkpoint is not fixed, but roving, or is removed from the border or its functional equivalents, the intrusion upon the individual's rights that inheres in the stop is not so easily justified. In such a case the court must weigh the government interest against the degree of intrusion in order to assess the constitutionality of that particular border stop.<sup>70</sup>

In *Almeida-Sanchez v. United States*,<sup>71</sup> the Court invalidated as unjustifiably intrusive the search of an automobile approximately twenty-five miles north of the Mexican border. Almeida-Sanchez, a Mexican citizen holding a valid United States work permit, was stopped by Border Patrol officers on an east-west highway in an undeveloped region of California.<sup>72</sup> The Border Patrol did not deny that it did not obtain a search warrant, nor did it have probable cause of any kind to support this stop<sup>73</sup>

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66. *Id.* (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *Adams v. Williams*, 407 U.S. 143, 146 (1972)).

67. *See id.* at 523-24 (Rehnquist, J., dissenting).

68. *Id.* at 501.

69. *Carroll v. United States*, 267 U.S. 132, 154 (1925).

70. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979).

71. 413 U.S. 266 (1973). The search in *Almeida-Sanchez* was conducted pursuant to § 287(a)(3) of the Immigration and Nationality Act, 66 Stat. 233 (1952) (codified at 8 U.S.C. § 1357(a)(3) (1982)), which provides for warrantless searches of automobiles "within a reasonable distance from any external boundary of the United States," as authorized by the regulations of the Attorney General. The Attorney General's regulation, 8 C.F.R. § 287.1 (1985), defines a "reasonable distance" as "within 100 air miles from any external boundary of the United States." *Id.*

72. *Almeida-Sanchez*, 413 U.S. at 267.

73. *Id.* at 268.

or even the "reasonable suspicion" necessary for a "stop-and-frisk" detention under *Terry v. Ohio*.<sup>74</sup> On appeal from his conviction on drug charges, Almeida-Sanchez challenged the constitutionality of the search, which uncovered marijuana.<sup>75</sup>

In finding that the stop violated Almeida-Sanchez's fourth amendment rights, the Court emphasized the substantial distance between the border and the point at which the stop was made. It remarked that although routine border searches are permissible not only at the border itself but also at its "fundamental equivalents," the search of Almeida-Sanchez's car on a road more than twenty miles north of the border was a search "of a wholly different sort."<sup>76</sup> The search was, therefore, unconstitutionally intrusive in the absence of probable cause or consent.<sup>77</sup>

The ruling of *Almeida-Sanchez* was given a broader application in *United States v. Brignoni-Ponce*,<sup>78</sup> where a roving patrol stopped Brignoni-Ponce's car on a north-south highway some distance north of the Mexican border.<sup>79</sup> The officers later explained that their only reason for stopping this particular car was that its three occupants appeared to be Mexicans.<sup>80</sup> Upon questioning Brignoni-Ponce and his two passengers, the officers learned that the passengers were illegal aliens. At his trial for transportation of illegal immigrants, Brignoni-Ponce moved to suppress the testimony of and about the aliens, asserting that this evidence was the fruit of an unlawful seizure.<sup>81</sup> The Supreme Court granted certiorari to determine whether a roving patrol may stop a vehicle in an area near—but not at—the border and question its occupants when the only ground for suspicion is that the occupants appear to be of Mexican ancestry.<sup>82</sup>

In upholding the decision of the Court of Appeals, the Court ruled that such a stop was prohibited by the fourth amendment. It explained that to allow Border Patrol officials full discretion in stopping motorists would contravene the reasonableness requirement of that amendment. Even though the intrusion involved in a roving patrol stop is "modest,"

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74. 392 U.S. 1 (1968).

75. *Almeida-Sanchez*, 413 U.S. at 267. Almeida-Sanchez was convicted of having knowingly received, concealed and facilitated the transportation of a large quantity of imported marijuana in violation of 21 U.S.C. § 1761(a) (1964).

76. *Almeida-Sanchez*, 413 U.S. at 273.

77. *Id.* at 272-73.

78. 422 U.S. 873 (1975).

79. *Id.* at 874-75. The stop took place on Interstate Highway 5 just north of San Clemente, near a fixed Border Patrol checkpoint that was closed due to inclement weather. *Id.*

80. *Id.* at 875.

81. *Id.*

82. *Id.* at 876.

the Court explained that a requirement of reasonable suspicion that a particular vehicle is carrying illegal aliens is necessary to protect citizens from "indiscriminate official interference."<sup>83</sup> In the absence of such suspicion, the Court held that a roving patrol stop in an area removed from the border is not reasonable within the meaning of the fourth amendment.<sup>84</sup>

The Court soon limited the reasonable suspicion requirement of *Brignoni-Ponce* when it found, in *United States v. Martinez-Fuerte*,<sup>85</sup> that no similar suspicion was needed for a stop at a permanent checkpoint located away from the border. *Martinez-Fuerte* involved various criminal prosecutions relating to the transportation of illegal aliens.<sup>86</sup> Each of the defendants was arrested at a fixed checkpoint operated by the Border Patrol on a major interstate highway leading away from the border between California and Mexico.<sup>87</sup> Each was first stopped and questioned at the checkpoint and then directed to a secondary inspection area to produce citizenship documents. The Government conceded that none of the stops at issue was based on any particular articulable suspicion.<sup>88</sup> In all three stops the occupants of the cars were arrested after questioning revealed that at least some of the passengers were illegal aliens, and in one case a search of the car subsequent to the questioning uncovered additional illegal aliens in the trunk.<sup>89</sup>

The Court of Appeals for the Ninth Circuit found the stops unconstitutional.<sup>90</sup> The Supreme Court reversed, arguing that a requirement of reasonable suspicion to stop automobiles on major inland routes would be impracticable given the heavy flow of traffic in such areas, and that the intrusion upon fourth amendment interests caused by such stops was so minimal as to be outweighed by the Government interest in facilitating immigration law enforcement.<sup>91</sup> The Court pointed to the diminished expectation of privacy a person has in his or her automobile as compared with his or her residence,<sup>92</sup> and emphasized that because the location of the checkpoints was not chosen by the officers in the field, the risk of

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83. *Id.* at 883.

84. *Id.*

85. 428 U.S. 543 (1976).

86. *Id.* at 545. The trials of the three defendants were consolidated by the Court of Appeals for the Ninth Circuit. *Id.* at 549.

87. *Id.* at 545. This was the same fixed checkpoint that had been closed due to bad weather in *Brignoni-Ponce*.

88. *Id.* at 547.

89. *Id.* at 547-48.

90. *Id.* at 549.

91. *Id.* at 556-59.

92. *Id.* at 561.

arbitrary or harassing stops of individuals is much less than in the case of roving patrols.<sup>93</sup> Having concluded that the initial stops were constitutional, the Court further held that it did not violate the fourth amendment for the Border Patrol officers to refer motorists selectively to the secondary inspection area on the basis of criteria that would not sustain a roving patrol stop: "Even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, . . . the intrusion here is sufficiently minimal that no particularized reason need exist to justify it . . . ." <sup>94</sup>

#### IV. REASONING OF THE COURT

##### A. Majority Opinion

By way of preface to his majority opinion in *INS v. Delgado*, Justice Rehnquist noted that the fourth amendment is not intended to proscribe *all* contact between citizens and police, but only to prohibit "arbitrary and oppressive interference" by police officers with individuals' privacy and personal security.<sup>95</sup> Because encounters between police and citizens are so diverse, however, Justice Rehnquist felt that the Court had been hesitant to define with precision the parameters of the fourth amendment's proscriptions. Thus it had formulated only broad tests, like those of *Terry v. Ohio*<sup>96</sup> and *United States v. Mendenhall*,<sup>97</sup> to determine whether a seizure has occurred. The *Terry* test, Justice Rehnquist commented, is useful in situations resembling traditional arrest, but is too difficult to apply in cases involving only brief detentions.<sup>98</sup> For this reason, the *Mendenhall* "totality of the circumstances" test would be applied in *Delgado*.<sup>99</sup>

Justice Rehnquist went on to note that the court of appeals placed its primary emphasis upon the fact that agents were stationed at the factory doors when it concluded that the surveys in this case constituted a seizure of the entire workforce.<sup>100</sup> In the lower court's view, the agents' presence at the doors indicated that "departures [by the workers] were

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93. *Id.* at 559.

94. *Id.* at 563.

95. *INS v. Delgado*, 104 S. Ct. 1758, 1762 (1984) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976)).

96. 392 U.S. 1, 19 n.16 (1968) (holding that seizure occurs "only when the officer, by means of physical force or show of authority, has restrained the liberty of a citizen").

97. 446 U.S. 544 (1980).

98. *Delgado*, 104 S. Ct. at 1762.

99. *Id.* at 1763.

100. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 634 (9th Cir. 1982), *rev'd sub nom. INS v. Delgado*, 104 S. Ct. 1758 (1984).

not to be contemplated,” and that the workers were “not free to leave.”<sup>101</sup>

Justice Rehnquist rejected the respondents’ claim that the entire workforces of the two factories were seized when the agents were stationed at the exits.<sup>102</sup> He asserted that the workers’ freedom of movement about the factory was restricted only by their “voluntary obligations to their employers,” and not by the conduct of the INS agents.<sup>103</sup> Justice Rehnquist pointed out that the workers continued to go about their business in the factory despite the disruptions caused by the presence of the agents.<sup>104</sup>

The majority opinion also rejected the notion that the agents positioned at the factory doors actually prevented workers from leaving the premises.<sup>105</sup> Justice Rehnquist asserted that the INS’ intent in guarding the exits was not to prevent egress, but only “to insure that all persons in the factories were questioned.”<sup>106</sup> Justice Rehnquist thus concluded that the respondents had no reason to fear that they would be detained so long as they gave truthful answers or simply refused to answer the questions put to them.<sup>107</sup> If merely questioning the workers while they were inside the factory did not implicate the fourth amendment, then neither did questioning them at the exits. Thus, Justice Rehnquist concluded, no citizen or alien lawfully present inside the factory had reason to fear that he would be detained by the INS agents.<sup>108</sup>

Justice Rehnquist next considered the court of appeals’ holding that the “detentive questioning” of individual workers was valid under the fourth amendment only if the INS agents had reasonable grounds to suspect that the individual being questioned was an illegal alien.<sup>109</sup> Because the Court had rejected the lower court’s holding that the INS’ method of

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101. *Delgado*, 104 S. Ct. at 1763.

102. *Id.* Justice Rehnquist further rejected the assertion that the fact that the surveys took place in factories, closed to the public, was indicative of seizure. He explained that because the INS agents were lawfully in the factories pursuant to a warrant or with the owner’s consent, and because there were other people around when each worker was questioned, the same considerations applicable to *public* encounters between citizens and police should apply here. *Id.* at 1763 n.5.

103. *Id.* at 1763.

104. *Id.*

105. *Id.*

106. *Id.* The Court dismissed as “[a]n ambiguous, isolated incident” the report of one of the respondents that an agent stationed at an exit had attempted to prevent a worker, presumably an illegal alien, from leaving the premises. The worker walked out the door, and when the agent tried to stop him he pushed the agent aside and ran away. *Id.* at 1764 n.6.

107. *Id.* at 1764.

108. *Id.*

109. *Id.* (quoting *International Ladies’ Garment Workers’ Union*, 681 F.2d at 638).

conducting factory surveys had resulted in a seizure of the entire workforces, Justice Rehnquist explained that the issue of whether questioning individual workers implicated the fourth amendment could be presented only if one of the named respondents were found to have been seized or detained.<sup>110</sup> Emphasizing that the respondents' own deposition testimony showed that the questioning was quite brief, Justice Rehnquist concluded that no individual seizure occurred.<sup>111</sup>

The respondents had argued that the surveys so disrupted their workplace as to create a psychological environment in which they were reasonably afraid that they were not free to leave. The respondents reasoned that the agents' questioning constituted a seizure under the fourth amendment because they reasonably feared that they must answer to avoid arrest. The Court rejected this argument, however, asserting that because the INS' "obvious" intent was merely to question people, those workers who continued with their business were not detained at all, but—at most—were simply asked a question or two. The Court pointed out that although those workers who attempted to escape the agents' questioning might have been seized, the respondents did not do so, and therefore were not detained.<sup>112</sup> In sum, Justice Rehnquist wrote:

The manner in which respondents were questioned, given its obvious purpose, could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory. Respondents may only litigate what happened to them, and our review of their description of the encounters with the INS agents satisfies us that the encounters were classic consensual encounters rather than Fourth Amendment seizures.<sup>113</sup>

### B. Concurring Opinions

Justice Stevens concurred in *INS v. Delgado*, noting that because no

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110. *Id.*

111. *Id.* Respondent Delgado had been speaking with a co-worker regarding the survey when two INS agents approached him to ask where he was from. When Delgado replied that he was from Mayaguez, Puerto Rico, one agent made "an innocuous observation" to the other, and then the two agents walked away. *Id.* Similarly, respondent Correa was questioned and then left alone after she gave an acceptable reply. *Id.* An agent tapped respondent Labonte on the shoulder and asked her, in Spanish, "Where are your papers?" Labonte responded that she had her papers and showed them to the agents, who then left. *Id.* The fourth respondent, Miramontes, was approached by an agent while en route to her worksite from another office. Questioned about her citizenship, Miramontes informed the agent that she was a legal resident alien. She then produced her work permit at the agent's request. *Id.* at 1764-65.

112. *Id.* at 1765.

113. *Id.*

trial had ever been held in the case, the Court was bound to review the record in the light most favorable to the INS, and to resolve all issues of fact in its favor.<sup>114</sup> Because he agreed that the respondents were not entitled to summary judgment, Justice Stevens joined the opinion of the Court.<sup>115</sup>

Justice Powell wrote a separate opinion concurring in the result.<sup>116</sup> Although the question of whether any of the respondents had been seized within the meaning of the fourth amendment was "a close one," Justice Powell argued that the Court need not have decided it, for—under the reasoning of *United States v. Martinez-Fuerte*<sup>117</sup>—such a seizure would have been reasonable.<sup>118</sup> In that case the Court weighed the public interest in the INS surveys, which it found to be high, against the interference with the fourth amendment rights of the individual, which it considered to be minimal.<sup>119</sup> Thus the Court ruled that the stops made at the checkpoints did not violate the fourth amendment, even in the absence of any articulable suspicion that a particular automobile was carrying illegal aliens.<sup>120</sup>

Justice Powell found *Martinez-Fuerte* to be analogous to the case at hand.<sup>121</sup> Citing statistics presented in an affidavit by an INS official,<sup>122</sup> Justice Powell declared that the government's interest in conducting factory surveys was at least as great as its interest in carrying out automobile stops at fixed checkpoints.<sup>123</sup> Given that many immigrants come to

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114. 104 S. Ct. 1758, 1765 (1984) (Stevens, J., concurring).

115. *Id.* at 1765 (Stevens, J., concurring).

116. 104 S. Ct. at 1765 (Powell, J., concurring in result).

117. 428 U.S. 543 (1976).

118. *Delgado*, 104 S. Ct. at 1765 (Powell, J., concurring in result).

119. *Id.* at 1766 (citing *Martinez-Fuerte*, 428 U.S. at 555). Justice Powell explained that the *Martinez-Fuerte* Court had noted the substantial government interest in maintaining routine checkpoint stops in order to control the flow of illegal aliens into the nation's interior. On the other side of the equation, the Court found that the intrusion upon individual drivers was limited due to the brevity of the stops and the "public and regularized" character of the stopping procedure. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 562).

120. *Id.* at 1766 (Powell, J., concurring in result) (citing *Martinez-Fuerte*, 428 U.S. at 562).

121. *Id.* (Powell, J., concurring in result).

122. The INS' assistant district director in Los Angeles had stated that factory surveys accounted for 50-75% of the daily arrests and identifications of illegal aliens in the Los Angeles district, that over 20,000 illegal aliens were arrested in that district in one year and that the surveys in the instant case had led to the arrest of between 20% and 50% of the workforce at each of the factories. *Id.* (Powell, J., concurring in result). This last figure broke down to 78 arrests out of 300 workers at the first survey at Davis Pleating Co., followed by 39 arrests out of 200 workers at the second raid of that factory. The third survey, at Mr. Pleat, resulted in the arrest of 45 illegal aliens from a workforce of approximately 90 employees. *Id.* at 1766 n.3 (Powell, J., concurring in result).

123. *Id.* at 1766 (Powell, J., concurring in result).



this country in the hope of finding employment, Justice Powell reasoned that to focus immigration law enforcement on the aliens' workplace is to strike directly at the cause of the immigration problem.<sup>124</sup> Justice Powell concluded that the government interest in the continued use of this enforcement technique is substantial, while the intrusion upon the individual workers—who are questioned only briefly and may continue their work as the survey progresses—is even more minimal than that felt by the motorists in *Martinez-Fuerte*.<sup>125</sup>

Justice Powell went on to discount the element of surprise inherent in the factory survey procedure, arguing that "the obviously authorized character of the operation, the clear purpose of seeking illegal aliens, and the systematic and public nature of the survey serve to minimize any concern or fright on the part of lawful employees."<sup>126</sup> He further asserted that the workers' expectation of privacy in their workplace, like a motorist's expectation of privacy in his automobile, is significantly less than the expectation of privacy one feels in one's residence.<sup>127</sup> Thus, as the Court found the checkpoint stops in *Martinez-Fuerte* to be reasonable without any particularized suspicion, Justice Powell upheld the factory surveys in *Delgado* on the same grounds.<sup>128</sup>

### C. Dissenting Opinion

Justice Brennan, with whom Justice Marshall joined, dissented in part and concurred in part.<sup>129</sup> Justice Brennan broke down the majority's holding into two prongs. The Court first held that the surveys did not constitute seizure of the entire workforce for the duration of the operation. The Court further held that the questioning of the individual respondents did not amount to seizure within the meaning of the fourth amendment.<sup>130</sup> Justice Brennan concurred in the Court's first decision, finding that there was no single continuing seizure of the workforce.<sup>131</sup>

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124. *Id.* (Powell, J., concurring in result).

125. *Id.* at 1766-67 (Powell, J., concurring in result).

126. *Id.* at 1767 (Powell, J., concurring in result).

127. *Id.* (Powell, J., concurring in result).

128. *Id.* (Powell, J., concurring in result). Powell further analogized the Border Patrol agents' selection of motorists to be sent to the secondary inspection site to the INS agents' selection of individual workers to be interrogated. He rejected the dissent's argument that the INS agents had greater discretion than did the officers of the Border Patrol, asserting that the selection procedure upheld in *Martinez-Fuerte* afforded Border Patrol officers "virtually unlimited discretion to refer cars to the secondary inspection area." *Id.* at 1767 n.6 (Powell, J., concurring in result).

129. 104 S. Ct. at 1767 (Brennan, J., dissenting in part).

130. *Id.* (Brennan, J., dissenting in part).

131. Justice Brennan felt that the fact that most of the workers were free to continue work-

He disagreed with the second decision, however, declaring that a correct application of precedent to the facts of this case showed that the respondents had been unreasonably seized during the factory surveys.<sup>132</sup> For that reason, Justice Brennan characterized the majority opinion as having a "studied air of unreality."<sup>133</sup> He felt that the majority's manipulation of the facts and precedent to reach its desired conclusion constituted "a considerable feat of legerdemain,"<sup>134</sup> and that although the Court had found the interrogations of the individual respondents to be consensual encounters, the record told a "far different story."<sup>135</sup>

Justice Brennan traced the line of the Court's previous inquiries into the circumstances under which a police officer's questioning of an individual may constitute fourth amendment seizure,<sup>136</sup> and cited Justice Stewart's plurality opinion in *United States v. Mendenhall*<sup>137</sup> as providing a useful summary of the preceding cases. Justice Brennan noted both Justice Stewart's comment that the fourth amendment is not implicated "as long as the person to whom questions are put remains free to disre-

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ing and to move about the workplace while the survey was being conducted supported the conclusion that no seizure of the workforce had occurred. He did, however, stress that he found the evidence regarding conditions throughout the factory during the course of the survey to be relevant in determining whether the individual respondents had been seized. *Id.* at 1767 n.2 (Brennan, J., dissenting in part).

132. *Id.* at 1767 (Brennan, J., dissenting in part).

133. *Id.* (Brennan, J., dissenting in part).

134. *Id.* at 1767-68 (Brennan, J., dissenting in part).

135. *Id.* at 1768 (Brennan, J., dissenting in part).

136. Justice Brennan disagreed with the majority's suggestion that the Court had not yet decided the issue of whether "mere questioning" of an individual by police could constitute a seizure. He conceded that "the question does not admit of any simple answer," but cited a long line of cases in which the issue had indeed been addressed. *Id.* (Brennan, J., dissenting in part). Justice Brennan further explained that it is difficult for the Court to strike a uniform balance between the conflicting interests of personal freedom and police effectiveness, but that nevertheless "the outline of what appears to be the appropriate inquiry has been traced over the years with some clarity." *Id.* (Brennan, J., dissenting in part). He then went on to cite *Terry v. Ohio*, 392 U.S. 1 (1968), in which the Court held that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person," and noted that such a seizure may occur when the officer uses either physical force or a show of authority to restrain the individual's liberty. *Delgado*, 104 S. Ct. at 1768 (Brennan, J., dissenting in part) (quoting *Terry*, 392 U.S. at 16, 19 n.16). Justice Brennan further quoted *Davis v. Mississippi*, 394 U.S. 721 (1969), which confirmed that detentions for purposes of questioning implicated the fourth amendment and which also noted that although police are free to question citizens regarding unsolved crimes, citizens are equally free to refuse to answer. *Delgado*, 104 S. Ct. at 1768 (quoting *Davis*, 394 U.S. at 727 n.6). Justice Brennan then cited the holding in *Brown v. Texas*, 443 U.S. 47 (1979), which invalidated the defendant's conviction for refusing to identify himself to police where the officers could point to no objective facts supporting a reasonable suspicion that the defendant was involved in any criminal activity. *Delgado*, 104 S. Ct. at 1768 (citing *Brown*, 443 U.S. at 51).

137. 446 U.S. 544 (1980).

gard the questions and walk away,' ”<sup>138</sup> and his statement that “ ‘a person has been “seized” within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’ ”<sup>139</sup> Justice Brennan further quoted Justice Stewart’s listing of circumstances which might produce such a reasonable belief.<sup>140</sup>

Justice Brennan noted that the *Mendenhall* formula, adopted by the majority in *Florida v. Royer*,<sup>141</sup> focused on the objective characteristics of the individual’s encounter with the police rather than upon “the subjective impressions of the person questioned.”<sup>142</sup> Furthermore, Justice Brennan explained, the *Royer* opinion provided useful guidance to the Court in deciding *Delgado* when it declared that although the fourth amendment is not violated when officers merely put questions to individuals on the street or in a public place, the person being questioned “may not be detained even momentarily without reasonable, objective grounds for doing so, and his refusal to listen or to answer does not, without more, furnish those grounds.”<sup>143</sup>

Applying the standards of *Royer* and *Mendenhall* to the instant case, Justice Brennan determined that the respondents indeed had been seized for purposes of the fourth amendment when the INS agents questioned them regarding their citizenship.<sup>144</sup> He reasoned that the surveys involved such a “show of authority” on the part of the INS that “a reasonable person could not help but feel compelled to stop and provide answers to the INS agents’ questions.”<sup>145</sup> Justice Brennan took issue with the majority’s insistence on considering the questioning of each of the respondents in isolation and ignoring the disruption going on in the factory around them.<sup>146</sup> He pointed to the respondents’ extensive testimony regarding the “widespread disturbance” that the survey provoked

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138. *Delgado*, 104 S. Ct. at 1769 (Brennan, J., dissenting in part) (quoting *Mendenhall*, 446 U.S. at 554).

139. *Id.* (Brennan, J., dissenting in part) (quoting *Mendenhall*, 446 U.S. at 554).

140. *Id.* (Brennan, J., dissenting in part) (quoting *Mendenhall*, 446 U.S. at 554). See *supra* note 53 and accompanying text.

141. 460 U.S. 491 (1983).

142. *Delgado*, 104 S. Ct. at 1769 (Brennan, J., dissenting in part). Nor does the *Mendenhall* analysis look to the subjective intent of the interrogating officer. The majority opinion in *Delgado* thus misapplied *Mendenhall* when it focused on the INS’ “intent” and “obvious purpose” in placing agents at the factory doors. See *supra* note 251 and accompanying text; see also *Delgado*, 104 S. Ct. at 1763-64.

143. *Delgado*, 104 S. Ct. at 1769 (Brennan, J., dissenting in part) (quoting *Royer*, 460 U.S. at 497).

144. *Id.* (Brennan, J., dissenting in part).

145. *Id.* (Brennan, J., dissenting in part).

146. *Id.* (Brennan, J., dissenting in part).

among the workers and the “intimidating atmosphere” that the INS’ investigating techniques created.<sup>147</sup> Taken together, Justice Brennan reasoned, these factors created an environment in which a reasonable person would feel that he had no choice but to answer any questions put to him.<sup>148</sup>

Justice Brennan further pointed to the respondents’ testimony about their own individual experiences, which indicated that they did not feel free to ignore the agents’ questioning.<sup>149</sup> He concluded from this testimony that the respondents had plainly felt that they had no choice but to answer the questions put to them by the INS agents.<sup>150</sup> Considering this feeling to be patently reasonable, Justice Brennan characterized the scene depicted by the respondents’ testimony as “a frightening picture of people subjected to wholesale interrogation under conditions designed not to respect personal security and privacy, but rather to elicit prompt answers from completely intimidated workers.”<sup>151</sup> Justice Brennan thus determined that the INS agents’ questioning of the individual respondents clearly constituted seizure for purposes of the fourth amendment.<sup>152</sup>

Having found that the fourth amendment was implicated, Justice

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147. Specifically, Justice Brennan cited the large numbers of INS agents who were employed in each of the surveys, the agents’ practice of handcuffing those persons whom they suspected of being illegal aliens and leading them away to vans parked outside the factory, the conspicuous positioning of guards at buildings’ exits, and the manner in which the agents flashed their badges and asked brusque, pointed questions of each of the workers. *Id.* at 1770 (Brennan, J., dissenting in part) (citing Appellant’s Brief at 48, 77-78, 81-85, 88, 102-03, 122-23, 125-26, 140-41, 144-55, 158).

148. Justice Brennan felt that it was “simply fantastic” that the majority could view these circumstances and still conclude that a reasonable person observing all of this would believe that he was free to refuse to answer the agents’ questions and walk away. *Id.* at 1770 (Brennan, J., dissenting in part).

149. For example, Respondent Delgado was told after initial questioning that the agents “would be coming back to check him out again because he spoke English too well.” Justice Brennan characterized this remark as “a final reminder of who controlled the situation.” *Id.* (Brennan, J., dissenting in part). Respondent Miramontes testified that she produced her work permit for an agent only after he identified himself as being from the INS and showed her his badge. Miramontes was quoted as saying, “He told me he was from Immigration, so I showed him the [work permit] papers when I saw his badge. If I hadn’t [seen his badge], I wouldn’t have shown them to him.” *Id.* (Brennan, J., dissenting in part) (quoting Appellant’s Brief at 121) (additions in original). Respondent Labontes was seated at her machine when an agent approached her from behind, tapped her on the shoulder, and asked for her papers. Although she did not wish to identify herself, Labontes testified, she did so when she saw the INS agents. *Id.* (Brennan, J., dissenting in part) (citing Appellant’s Brief at 138).

150. *Id.* (Brennan, J., dissenting in part).

151. *Id.* (Brennan, J., dissenting in part).

152. *Id.* (Brennan, J., dissenting in part). Justice Brennan noted that because the respondents had not contended that the interrogation sessions were “custodial” in nature, he need not consider whether the agents’ questioning of the respondents violated their fifth amendment right against self-incrimination, nor whether the agents had a duty under *Miranda v. Arizona*,

Brennan addressed the issue of whether the seizures in this case were justified on the basis of reasonable, objective criteria.<sup>153</sup> He emphasized that the requirement of particularized suspicion to justify even a brief detention was necessary to protect citizens against "unwarranted governmental interference with their personal security and privacy."<sup>154</sup>

Justice Brennan determined that, in the instant case, the seizures of the individual workers were neither justified by reasonable suspicion nor carried out in such a way as to place neutral limitations on the officers' conduct so that unreasonable government interference might be minimized.<sup>155</sup> Instead, the INS agents interrogated nearly every worker in each factory surveyed, irrespective of whether they were United States citizens, lawful resident aliens or deportable illegal aliens.<sup>156</sup> In Justice Brennan's view, the only arguably objective criteria used by the agents in determining whether or not to interrogate a particular worker were whether he or she had a Latin appearance or spoke Spanish in the workplace.<sup>157</sup> Thus, he argued that those workers who were not illegal aliens—a "clear majority" at each of the surveyed factories—were subjected to the intrusion of questioning by INS agents who had no objectively reasonable basis for suspecting them of any misconduct.<sup>158</sup>

Moreover, Justice Brennan argued, even if the INS agents had questioned only those workers whom they reasonably suspected of being *aliens*, they still would have violated the fourth amendment rights of the United States citizens questioned in this case. Because it is virtually impossible to accurately distinguish between United States citizens of Mexican ancestry and Mexican aliens, Justice Brennan explained that such a policy would not, in practice, prevent the questioning of citizens who appear to be of Mexican heritage.<sup>159</sup> Therefore, in order to protect the rights of both citizens and lawful resident aliens, who are also protected

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384 U.S. 436 (1966), to warn the respondents that their answers might be used against them. *Id.* at 1770-71 n.3 (Brennan, J., dissenting in part).

153. *Id.* at 1771 (Brennan, J., dissenting in part). Justice Brennan cited *United States v. Cortez*, 449 U.S. 411, 417 (1981), for the proposition that investigatory stops, even those falling short of traditional arrest, "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *Id.*

154. *Delgado*, 104 S. Ct. at 1771 (Brennan, J., dissenting in part).

155. *Id.* (Brennan, J., dissenting in part) (quoting *Brown v. Texas*, 443 U.S. 47, 51 (1979)).

156. *Id.* (Brennan, J., dissenting in part).

157. *Id.* at 1771-72 (Brennan, J., dissenting in part).

158. In Justice Brennan's opinion, "[t]o say that such an indiscriminate policy of mass interrogation is constitutional makes a mockery of the word of the Fourth Amendment." *Id.* at 1772 (Brennan, J., dissenting in part).

159. *Id.* (Brennan, J., dissenting in part) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 886 (1975)).

by the fourth amendment,<sup>160</sup> Brennan concluded that the INS should be required to limit its interrogations to those workers who are reasonably suspected of being illegal aliens.<sup>161</sup>

Justice Brennan objected to Justice Powell's assertion that the questioning of the respondents constituted a seizure that was reasonable under the balancing test of *United States v. Martinez-Fuerte*.<sup>162</sup> He noted the Court's recognition<sup>163</sup> that the "crucial distinction" between the roving patrols invalidated in *United States v. Brignoni-Ponce* and the fixed checkpoint stops upheld in *Martinez-Fuerte* was the "lesser intrusion upon the motorist's Fourth Amendment interests" caused by the checkpoint stops.<sup>164</sup> Given this distinction, Justice Brennan reasoned that Justice Powell's reliance upon *Martinez-Fuerte* in support of his position was misplaced, as the factors which contributed to the greater intrusion of the roving stops—the element of surprise and the extensive discretion vested in the investigating officers—were equally present in the factory surveys.<sup>165</sup> Thus the rationale fashioned by the *Martinez-Fuerte* Court in support of its validation of the fixed checkpoint stops was, in Justice Brennan's opinion, inapposite to the case at hand.<sup>166</sup>

Justice Brennan concluded that the INS could not continue to conduct its factory surveys without violating workers' fourth amendment rights unless it either adopted a policy of interrogating only those workers reasonably suspected of being illegal aliens or established a factory survey procedure that is "predictably and reliably less intrusive" than that used in the surveys at issue in the instant case.<sup>167</sup> The first alternative, he explained, would provide for the particularized suspicion required under *Terry v. Ohio*, while the second would make the survey procedure more closely analogous to the program upheld in *Martinez-Fuerte*. This second alternative might, as Justice Brennan envisioned it,

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160. *Id.* (Brennan, J., dissenting in part) (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973)).

161. *Id.* (Brennan, J., dissenting in part).

162. *Id.* at 1773 (Brennan, J., dissenting in part).

163. *See Delaware v. Prouse*, 440 U.S. 648 (1979).

164. *Id.* at 656.

165. *Delgado*, 104 S. Ct. at 1774 (Brennan, J., dissenting in part). Justice Brennan further explained that although a motorist's expectation of privacy in his automobile on the open highway is limited, the expectation of privacy a worker feels in his workplace, though modest, is a "legitimate" interest which "cannot be indiscriminately invaded by government agents." *Id.* (Brennan, J., dissenting in part) (citing *Mancusi v. Deforte*, 392 U.S. 364, 368-69 (1968)). Moreover, the employer's having consented to the INS' entry into the factory "does not mean that the workers' expectation of privacy [in their workplace] evaporates." *Id.* (Brennan, J., dissenting in part).

166. *Id.* at 1774 (Brennan, J., dissenting in part).

167. *Id.* (Brennan, J., dissenting in part).

require a warrant based upon a showing of reasonable suspicion that the factory to be surveyed employed a certain number of illegal aliens subject to deportation. Additionally, Justice Brennan urged, the surveys should be made shorter and less disruptive so as to reduce the intrusion they caused upon the workers.<sup>168</sup>

Finally, Justice Brennan asserted that the majority had become "so mesmerized by the magnitude" of the nation's illegal alien problem that it "too easily allowed Fourth Amendment freedoms to be sacrificed."<sup>169</sup> He criticized the Court for having granted "virtually unconstrained discretion" to the INS and for having willingly placed all of the burdens of this faulty law enforcement scheme upon Mexican-American citizens and lawful resident aliens, while remaining unwilling to penalize the employers whose policies of hiring illegal aliens provide a powerful incentive for aliens to enter this country in the first place.<sup>170</sup> The solution to the immigration problem, Brennan warned, was not to be found in the sacrifice of constitutional freedoms, but only in a legislative reevaluation of immigration law and policy.<sup>171</sup>

## V. ANALYSIS

The majority opinion in *INS v. Delgado* was clearly a result-oriented decision. In order to reach its desired conclusion, the majority was forced to ignore certain threshold issues, to misrepresent the factual record and to misapply the relevant legal precedent. Whether this conclusionary treatment derived from any xenophobic or racist tendencies on the part of the individual Justices or merely from a pragmatic desire to extend immigration officers' powers to enforce the law, it resulted in a fundamentally defective and unsatisfying analysis.

### A. Threshold Issues

The *Delgado* record gave rise to three issues which should properly have been addressed at the outset of the Court's analysis. However, far from giving these issues—(1) the constitutional validity of the warrants pursuant to which the raids were conducted,<sup>172</sup> (2) the possible equal protection violations arising from the singling out of Mexican-American citizens<sup>173</sup> and (3) the validity of the factory owner's consent in lieu of a

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168. *Id.* at 1774-75 (Brennan, J., dissenting in part).

169. *Id.* at 1775 (Brennan, J., dissenting in part).

170. *Id.* (Brennan, J., dissenting in part).

171. *Id.* at 1776 (Brennan, J., dissenting in part).

172. See *infra* notes 176-94 and accompanying text.

173. See *infra* notes 195-202 and accompanying text.

warrant<sup>174</sup>—the primary consideration they deserved, the majority Justices chose to ignore them completely. The Justices may have felt that these issues were improperly raised at trial or on appeal, or that their disposition of the other issues in the case was such that they need not reach these threshold questions.<sup>175</sup> If so, a footnote to that effect would have sufficed to explain the Court's failure to resolve these initial issues. In the absence of such an explanation, however, the lack of any resolution of these preliminary inquiries seems strikingly improper.

### 1. Validity of the search warrants

Two of the three raids at issue in *Delgado* were conducted pursuant to warrants authorizing a search for persons. The warrants did not list any suspected illegal aliens by name, but were worded as if the agents were seeking not persons but personal property: "[T]here is now being concealed certain property, namely persons, namely illegal persons which are the fruits and instrumentalities and evidence of violations of Title 8, United States Code, Sections 1324 and 1325 . . . ."<sup>176</sup> In essence, each warrant purported to authorize entry into the factory to look for illegal aliens, who were in essence the "fruits and instrumentalities" of their own illegal presence.<sup>177</sup>

That these warrants failed to name any particular suspected illegal alien indicates that they were not criminal search warrants, but were instead "hybrid" warrants of the type authorized by the District of Colum-

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174. See *infra* notes 203-12 and accompanying text.

175. Although Justice Brennan, dissenting in *Delgado*, did question the effect of the employer's consent upon the workers' expectations of privacy, see *supra* note 165, neither Justice Rehnquist's opinion for the Court nor the Ninth Circuit addressed the consent issue in any significant way. The circuit court, however, explained its failure to dispose of this question by noting that it need not reach this issue because it had determined that the raids as conducted violated the workers' fourth amendment rights. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 629 (9th Cir. 1982), *rev'd sub nom.* *INS v. Delgado*, 104 S. Ct. 1758 (1984). See *supra* note 9 and accompanying text.

176. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d at 624, 627 n.5 (9th Cir. 1982). While 8 U.S.C. § 1324 (1984) makes bringing in or harboring illegal aliens unlawful, § 1325 provides that aliens who enter the United States without authorization or who obtain entry by concealing information about themselves are subject to criminal prosecution. It should be noted that employers of illegal aliens are rarely prosecuted under § 1324, as under federal law hiring illegal aliens does not constitute harboring them and is neither a civil nor a criminal offense. See 8 U.S.C. § 1324(a)(4) (1970 & Supp. 1983). See also Note, *Individualized Suspicion in Factory Searches—The "Least Intrusive Alternative,"* *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982), 21 AM. CRIM. L. REV. 403, 405 n.1 (1983-84).

177. See Note, *The Factory Raid: An Unconstitutional Act?*, 56 S. CAL. L. REV. 605, 620 (1982-83).



bia Circuit in *Blackie's House of Beef, Inc. v. Castillo*.<sup>178</sup> A hybrid warrant is something of a cross between a criminal search warrant, which must be supported by substantial probable cause and particularity,<sup>179</sup> and a routine inspection warrant, which requires a significantly lower standard of probable cause.<sup>180</sup> The hybrid warrant standard allows the INS to procure a warrant to inspect commercial premises for undocumented aliens without specifying by name or description the particular persons sought, so long as some specific and reliable suspicion is shown "to prevent the exercise of unbridled discretion" by INS officers.<sup>181</sup>

The Supreme Court has not addressed the constitutional validity of the hybrid warrant.<sup>182</sup> However, the Supreme Court opinions upon which the District of Columbia Circuit relied most heavily in formulating its hybrid standard in *Blackie's* do not truly support application of such a standard to INS procedures. In *Camara v. Municipal Court*,<sup>183</sup> the Court recognized a lower standard of probable cause for warrants for routine inspections of residential premises by officials seeking to enforce health and safety codes. This lower standard was justified despite the fourth amendment's protection against unreasonable government intru-

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178. 659 F.2d 1211 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 940 (1982) (establishing hybrid warrant standard for INS raids of commercial businesses). The new hybrid standard allows a warrant to be issued on a showing of "sufficient specificity and reliability to prevent the exercise of unbridled discretion by law enforcement officials." *Id.* at 1225. The warrant need not name or describe the individuals to be sought. *Id.* This hybrid standard was presumably applied by the INS nationwide when, two months after the Supreme Court denied certiorari in *Blackie's House of Beef*, INS agents apprehended thousands of suspected illegal aliens in a sweep of job sites across the country. Note, *Fourth Amendment Warrant Standards for Immigration Search of Business Premises for Undocumented Aliens: A New Hybrid Probable Cause?*, 13 RUTGERS L.J. 607, 607 n.1 (1982) (citing N.Y. Times, Apr. 27, 1982, at A14, col. 1).

179. The level of probable cause traditionally required for a criminal warrant is suspicion such that a reasonable person can believe that "the legitimate object of a search is located in a particular place." *Steagald v. United States*, 451 U.S. 204, 213 (1981).

180. Probable cause for a routine inspection warrant exists when "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling." *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967).

181. *Blackie's House of Beef*, 659 F.2d at 1225. See *supra* note 178.

182. The Court declined to review the District of Columbia Circuit's decision in *Blackie's House of Beef*, 455 U.S. 940 (1982), and, as noted above, failed to address the warrant issue in its consideration of *Delgado*. See *supra* note 175 and accompanying text.

The United States District Court for the Northern District of California, however, has squarely rejected the use of hybrid warrants in INS raids. In a decision issued on October 11, 1985, Judge Robert Aguilar of San Jose ruled that INS agents may not enter a factory or other workplace without employer consent except with a warrant naming specific suspected illegal aliens. Judge Aguilar further ruled that agents may not add the phrase "and others" to specific names. See L.A. Times, Oct. 13, 1985, § II, at 6, col. 1.

183. 387 U.S. 523 (1967).

sions, the Court explained, because the strong state interest in conducting area inspections to ensure compliance with these codes outweighs the invasion which such a search entails.<sup>184</sup> The Court based its decision on three factors: (1) the historical acceptance of such inspections by the courts and the public; (2) the lack of any acceptable and practical alternatives; and (3) the fact that the inspections aim at premises, not at people, and are noncriminal in nature.<sup>185</sup> These factors minimize the inspections' intrusiveness, the Court held, so that probable cause to believe that a particular building contains a housing code violation need not be shown. Instead, probable cause may be found and a warrant to inspect may be issued "if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."<sup>186</sup>

Although the court in *Blackie's* interpreted *Camara* and its progeny as supporting an application of the hybrid warrant standard to administrative searches in general, those cases in fact dealt with inspections of a distinct and distinguishable type. The factors emphasized by the *Camara* court to support its formulation of the lower standard are unique to routine inspections to enforce compliance with health and safety codes, and are simply not present in immigration searches of business premises. First, the surprise INS raids have no history of judicial and popular acceptance to parallel that of *Camara*-type inspections; indeed, factory sweeps were discontinued by executive order in 1980 and were reinstated only after the administration changed one year later.<sup>187</sup> Moreover, as the Ninth Executive Circuit held in *Delgado*, procedures far less intrusive than those currently employed by the INS may be used to serve the same law enforcement objectives.<sup>188</sup> Finally, both the surprise nature of the INS raids and their focus on people rather than property render them far more intrusive than the inspections of premises at issue in *Camara*.<sup>189</sup>

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184. *Id.* at 533-37.

185. *Id.* at 537.

186. *Id.* at 538.

187. President Carter ordered the sweep procedures stopped to ensure that aliens would cooperate in the 1980 census, but President Reagan reinstated the sweeps when he took office in 1981. See Low, *Justices to Decide Legality of Sweeps for Aliens on Jobs*, L.A. Daily J., Apr. 26, 1983, at 1, col. 2; *id.*, Apr. 18, 1984, at 1, col. 6.

188. The circuit court held that the INS raids could and must be conducted according to restrictive neutral limitations, e.g., in accordance with a plan requiring reasonable suspicion that each individual questioned is an illegal alien. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 640-44 (9th Cir. 1982), *rev'd sub nom.* *INS v. Delgado*, 104 S. Ct. 1758 (1984). See Note, *supra* note 176, at 416-17.

189. See *supra* notes 185-86 and accompanying text.

Given these differences, the *Blackie's* court's extension of the *Camara* hybrid warrant standard to INS searches seems questionable.

Even if the hybrid standard were properly extended to INS procedures, it is clear that such a warrant alone could not authorize the search or seizure of any persons found on the premises. An administrative warrant only authorizes entry to the premises described in the warrant.<sup>190</sup> Once the agents executing the warrant are inside the premises, their contact with persons found there must be considered warrantless.<sup>191</sup> Any determination of the reasonableness of that contact must take that warrantlessness into account. Although the fourth amendment does not specifically prohibit searches conducted without a warrant, such searches are generally presumed to be unreasonable.<sup>192</sup> Further, while section 287(a)(3) of the Immigration and Nationality Act<sup>193</sup> purports to provide the INS with authority to interrogate without a warrant any alien concerning his right to remain in the United States, that statutory authority is clearly limited by the reasonableness requirement of the fourth amendment.<sup>194</sup> Thus the constitutionality of the use of hybrid warrants in the *Delgado* case should have been addressed as a threshold issue in the Court's analysis.

## 2. Equal protection considerations

A further concern conspicuously ignored by the *Delgado* majority is the potential for violations of equal protection inherent in the procedures by which INS agents obtain and execute hybrid warrants. First, the affidavits upon which the warrants are based often state only racial stereotypes or "alien profiles" rather than specific descriptions of particular suspected individuals.<sup>195</sup> Thus, not only illegal aliens, but also citizens

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190. *Illinois Migrant Council v. Pilliod*, 531 F. Supp. 1011, 1020 (N.D. Ill. 1982). See Note, *supra* note 177, at 623.

191. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 629 n.8 (9th Cir. 1982), *rev'd sub nom. INS v. Delgado*, 104 S. Ct. 1758 (1984). See Comment, *INS Surveys of Business Establishments: Reasonable, Individualized Suspicion of Illegal Alienage*, 78 NW. U.L. REV. 632, 641 (1983).

192. *Camara*, 387 U.S. at 528-29.

193. 8 U.S.C. § 1357(a) (1976) provides in pertinent part:

Any officer or employee of the Service . . . shall have the power without warrant—  
(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States; (2) to arrest any alien . . . if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.

194. See Note, *Fourth Amendment Limitations on Nonborder Searches for Illegal Aliens: The Immigration and Naturalization Service Meets the Constitution*, 39 OHIO ST. L.J. 66, 74 (1978).

195. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 627 n.5 (9th

and lawful aliens whose Hispanic heritage is evident in their dress and physical appearance, are targeted by the warrants and by the agents who use them.

Further, because the warrants need not name specific suspected aliens nor even describe them, agents are given broad discretion in determining which workers to interrogate once they have entered the premises. At this level, too, individuals are singled out on the basis of their Hispanic appearance,<sup>196</sup> so that the rights of Mexican-American citizens may be imperiled. The equal protection considerations attending this outcome have been noted by the District Court for the Southern District of New York, which found

[s]trong public interest in the protection of citizens from campaigns by law enforcement officials . . . especially so in view of the dominant role which physical or racial appearance inevitably plays in the officer's decision to stop and inquire, a factor which adds significant Fourteenth Amendment overtones to what is essentially a Fourth Amendment problem.<sup>197</sup>

Even where no warrant has been obtained or executed, however, as with the raid in *Delgado* conducted pursuant to the factory owner's consent, INS procedures raise equal protection concerns. Although the INS' statutory authority to perform warrantless arrests and interrogations<sup>198</sup> seems racially neutral on its face, studies suggest that the statute unfairly burdens Mexican-Americans in its administration.<sup>199</sup> Such a result can only be expected from the statute's broad grant of discretion to INS

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Cir. 1982), *rev'd sub nom.* INS v. Delgado, 104 S. Ct. 1758 (1984) (affidavit of INS investigator stated that affiant had observed "twenty persons of apparent Latin decent [sic]" entering the factory premises).

196. The Ninth Circuit noted a list of factors considered by INS agents to indicate illegal alienage: "the person's clothing, facial appearance, hair coloring and styling, demeanor (i.e. anxiety or fright), language and accent, and a multitude of subjective . . . 'multisensory' factors." *Id.* at 627 n.6. On the witness stand in another action challenging the constitutionality of INS factory sweeps, an INS criminal investigator stated that agents looked for a number of visible characteristics, including: unstylish haircuts on men, old-fashioned haircuts on women, lack of eyeglasses, old dress shoes instead of work shoes, lack of jewelry, odor, short height and politeness. Illegal aliens "don't wear designer jeans," the investigator said. *Martinez v. Nygaard*, No. 84-380 (D. Ore.) (tried December, 1984) (to be decided in Spring, 1985) (Testimony of INS agent Kent Nygaard), *quoted in* Girdner, *Oregon Case Tests INS Authority in Mass Detentions*, L.A. Daily J., Dec. 25, 1984, at 20, col. 5.

197. *Marquez v. Kiley*, 436 F. Supp. 100, 113 (S.D.N.Y. 1977) (disapproving use of racial profiles in INS street operations).

198. *See supra* note 193.

199. In "Project Jobs," a recent crackdown on illegal aliens nationwide, more than 80% of the arrestees were Mexicans. By contrast, most estimates of illegal aliens in the country indicate that only 50% are of Mexican heritage. *See Note, supra* note 177, at 641 n.214.

agents, who, by their own admission,<sup>200</sup> look almost exclusively to racial characteristics in determining which individuals should be questioned. Of course, this racially disproportionate impact does not, in itself, render a facially neutral statute unconstitutional,<sup>201</sup> but it does raise equal protection questions which the *Delgado* Court should have addressed, if not resolved.<sup>202</sup>

### 3. Validity of entry by owner's consent

Perhaps the most striking of the three threshold issues ignored by the *Delgado* Court is the constitutional validity of the INS' entry into one of the factories without a warrant but with the factory owner's consent. By its silence on this issue, the Court treated consent as if it were essentially equivalent to the warrants used in the other two raids. As has been explained, these warrants authorized entry to the factory premises to search not for objects, but for the *persons* of the unnamed suspected illegal aliens.<sup>203</sup> To allow the owner to waive the warrant requirement was, therefore, to allow him to waive the rights of the employees whose persons were the subjects of the search. Such a result seems absurd on its face in light of the Court's recognition that employees hold a reasonable expectation of privacy in their workplace, which cannot logically dissolve at the moment of the employer's consent.<sup>204</sup> Moreover, the Court's previous decisions regarding third party standing to consent to search and seizure have generally required that the consenting party hold some proprietary or possessory interest in both the premises searched and the item seized,<sup>205</sup> or that the consenting party has been given implied or express

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200. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 643 (9th Cir. 1982), *rev'd sub nom. INS v. Delgado*, 104 S. Ct. 1758 (1984).

201. The Court generally will not invalidate on equal protection grounds a statute neutral on its face absent proof that the enacting body was motivated by discriminatory intent. *Mobile v. Bolden*, 446 U.S. 55, 66-68 (1981).

202. One possible resolution to the problem would be to restrict INS interrogation to those individuals whose physical appearance substantially resembles that of particular illegal aliens previously suspected of being on the premises. Note, *supra* note 177, at 633-34.

203. See *supra* notes 176-77 and accompanying text.

204. See *INS v. Delgado*, 104 S. Ct. 1758, 1774 (1984) (Brennan, J., dissenting): "The mere fact that the employer has consented to the entry of the INS onto his property does not mean that the workers' expectation of privacy evaporates." See also *supra* note 165 and accompanying text and *infra*, note 230 and accompanying text.

205. *Chapman v. United States*, 365 U.S. 610 (1961) (landlord cannot consent to warrantless search of tenant's premises even if landlord has right of entry to clean or to inspect); *Stoner v. California*, 376 U.S. 483 (1964) (search of defendant's hotel room without warrant but with consent of hotel clerk violated defendant's fourth amendment rights despite hotel management's proprietary interest in room).

authority by the subject of the search to waive his right to object.<sup>206</sup> Neither of these conditions was fulfilled in the *Delgado* case, however. The factory owner clearly could have no proprietary interest in the persons of the workers, which were the "items" to be seized. If he could not consent to the search of *property* wholly owned by his employees, he should not be allowed to consent to the search for their *persons*. Nor had the employees authorized the owner to waive their rights, unless such a waiver is to be inferred from the fact of their employment.<sup>207</sup> Moreover, the employer would have no standing to *assert* the constitutional rights of the employees detained on his premises when he was not himself detained;<sup>208</sup> *a fortiori*, he should not have standing to *wave* his employees' rights to object to such a detention.

Beyond its weak legal foundation, the Court's acceptance of the employer's consent as a valid waiver of the workers' right to object to warrantless interrogation fails on a number of logical levels. First, the employer should not be allowed to consent away his employees' objections because, unlike the workers against whom the interrogation is to be targeted, the employer has no reason to object to the agents' entry. An employer cannot be held liable under existing federal law for employing illegal aliens.<sup>209</sup> He may, however, be subjected to retaliatory raids if he *refuses* to consent and forces INS agents to come back with a warrant.<sup>210</sup> Indeed, one employers' association has warned factory owners that they

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206. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (defendant's wife's consent to search of house valid because sharing of living quarters gave wife implied authority to waive defendant's objections).

207. Although the Supreme Court has not specifically addressed this issue, the general rule is that an employer can consent only to the search of property used by the employee in connection with the work of the office. LaFave, *Search and Seizure: "The Course of True Law . . . Has Not . . . Run Smooth,"* 1966 U. ILL. L.F. 255, 320. See *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (official superior of government employee could not consent to search of employee's desk for purse or other personal belongings).

208. *Garcia v. INS*, No. 81-F-680, slip op. at 8, 23, 25 (D. Colo. Nov. 4, 1982) (employer cannot assert employees' fourth amendment rights). See also *Delgado*, 104 S. Ct. at 1765: "Respondents may only litigate what happened to them . . . ."

209. Although 8 U.S.C. § 1324 prohibits the bringing in or harboring of illegal aliens, *hiring* illegals does not constitute harboring them under the law. See *supra* note 176. Moreover, Congress has consistently rejected proposals to sanction employers as a method of immigration law enforcement. See Note, *supra* note 177, at 621 n.97. See also Jost, *Immigration Problems Not Easily Swept Away*, L.A. Daily J., Apr. 23, 1984, at 2, col. 6 (noting bill pending before the House of Representatives which would impose penalties on employers who knowingly hire illegal aliens); *Id.*, Apr. 24, 1984, at 4, col. 1 ("[T]he raids are no substitute for the immigration-policy reform that Congress alone can provide[, such as] . . . the long-stymied Simpson-Mazzoli bill, which would grant amnesty to illegals who have been here longest and would punish employers (albeit less severely than originally proposed) who hire those who do not qualify for amnesty.").

210. Note, *supra* note 177, at 619 n.89.

are better off allowing warrantless entry of their premises, as to antagonize agents could result in their factories' "receiving the regular attention of the INS."<sup>211</sup>

A second logical flaw in the position that an employer's consent may operate to waive workers' rights arises from the employer's bargaining position vis-à-vis his employees. The threat of calling in the immigration authorities is a powerful economic weapon for an employer who knows that his workers, or members of their immediate families, are of questionable citizenship status. The workers' bargaining power is in this way weakened, resulting in lower wages and substandard working conditions.<sup>212</sup> Thus, to grant to an employer the authority to waive his employees' objections to INS entry of their workplace is to empower him to use the workers' fear of unreasonable governmental intrusion for his own economic gain. Surely such a result was worthy of the *Delgado* Court's attention in its analysis of the factory raids' fourth amendment implications.

### B. Legal and Factual Misrepresentations

The application of the relevant legal precedent to the facts of this case may follow either of two analytical paths. On the one hand, the factory surveys may be considered to be similar to the Border Patrol stops at issue in *United States v. Martinez-Fuerte*<sup>213</sup> and *United States v. Brignoni-Ponce*<sup>214</sup> and may therefore be evaluated under the standards formulated in those cases. Alternatively, the surveys may be analogized to the investigative interrogations in *Florida v. Royer*,<sup>215</sup> *United States v. Mendenhall*<sup>216</sup> and *Brown v. Texas*,<sup>217</sup> and analyzed accordingly. Either

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211. A January 1982 memorandum circulated to employers by the California Furniture Manufacturers' Association warned:

INS officers may come to your plant either with or without a search warrant. If they do not have a warrant, you have no legal obligation to admit them. But . . . [i]f you force them to secure a search warrant, you will create an adversary role for yourself vis-a-vis INS which may work to your disadvantage and could result in your receiving the regular attention of the INS. Logically, then, it is advisable to admit inspectors to your premises whether or not they have a search warrant.

See Note, *supra* note 177, at 619 n.89. See also Comment, *supra* note 191, at 641 n.51.

212. Comment, *supra* note 191, at 648-49 n.88 (citing 128 CONG. REC. S10,310 (daily ed. Aug. 12, 1982) (statement of Sen. Kennedy) and SENATE COMM. ON THE JUDICIARY IMMIGRATION REFORM AND CONTROL, S. REP. NO. 485, 97th Cong., 2d Sess. 20-26 (1982)).

213. 428 U.S. 543 (1976).

214. 422 U.S. 873 (1975).

215. 460 U.S. 491 (1983).

216. 446 U.S. 544 (1980).

217. 443 U.S. 47 (1979).

mode of analysis, however, compels a conclusion different from that reached by the majority of the Court.

### 1. Analysis under border stop standards

What has emerged from the Court's reasoning in each of the border stop cases is a balancing of the government's interest in the stopping procedure against the stop's intrusion upon the individual.<sup>218</sup> This balancing test evaluates not so much whether the stop constitutes a seizure implicating the fourth amendment, but whether the stop is reasonable, so that the fourth amendment—if implicated—is not violated.<sup>219</sup> Where the public interest is great and the intrusion minimal, as in the fixed checkpoint stop in *Martinez-Fuerte*, the stop may be reasonable even absent specific and articulable facts warranting suspicion that the car contains illegal aliens.<sup>220</sup> Where the intrusion upon the individual is more substantial, however, as in the roving patrol stop in *Brignoni-Ponce*, particularized suspicion is required.<sup>221</sup>

The high degree of intrusion found in *Brignoni-Ponce* was a function of two factors, each of which is also present in the factory surveys at issue in *Delgado*. The first of these factors is the "broad and unlimited discretion"<sup>222</sup> that immigration law enforcement officers enjoy when they are allowed to detain individuals for questioning without any objective reason to suspect them of misconduct. The Court in *Brignoni-Ponce* declared that to grant such discretion to the Border Patrol officers who patrol the roads near the border would be to "subject the residents of these and other areas to potentially unlimited interference with their use of the highways."<sup>223</sup> Similarly, to allow the INS full discretion in conducting its surveys of factories in areas frequented by illegal aliens is to subject local citizens and lawful resident aliens to unchecked intrusion upon their privacy and security within their workplace. Were a Border Patrol officer allowed to justify his stop, and an INS agent his interrogation, upon the single factor cited in both *Brignoni-Ponce* and *Delgado*—the questioned individual's "apparent Mexican ancestry"<sup>224</sup>—the fourth amendment rights of the large numbers of native-born and naturalized citizens who have the physical characteristics identified with Mexican

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218. See *Brignoni-Ponce*, 422 U.S. at 878; *Martinez-Fuerte*, 428 U.S. at 557-58.

219. *Brignoni-Ponce*, 422 U.S. at 878.

220. *Martinez-Fuerte*, 428 U.S. at 545.

221. *Brignoni-Ponce*, 422 U.S. at 876.

222. *Id.* at 882.

223. *Id.*

224. See *id.* at 885-87; *INS v. Delgado*, 104 S. Ct. 1758, 1772 (1984) (Brennan, J., dissenting in part).



ancestry would be continually violated. Such a result would be constitutionally intolerable, for, as the Court in *Brignoni-Ponce* recognized, the power under which Congress regulates the admission of aliens "cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens."<sup>225</sup> And yet such a diminution of rights is exactly what the majority ruling in *Delgado* will entail.

The second factor which contributed to the high level of intrusion in *Brignoni-Ponce* and in *Delgado* is the element of surprise. In distinguishing a stop at a fixed checkpoint from a roving patrol stop such as that in *Brignoni-Ponce*, the Court in *Martinez-Fuerte* noted that although the stopping procedure was the same in a checkpoint stop as in a roving one, "the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop."<sup>226</sup> The motorists' fear is reduced because "they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere."<sup>227</sup> Where the individual has no advance warning, however, as in a *Brignoni-Ponce* roving stop or a surprise factory raid, the unexpected police contact may cause concern or fear in even the most reasonable individual. Where this fear is experienced by an entire group of individuals, as it was in each of the factories during the INS surveys, each individual's concern can only be heightened. As one of the respondents testified: "[N]ormally you get nervous when you see everybody is scared, everybody is nervous."<sup>228</sup>

The element of surprise inherent in the factory surveys substantially increases the procedure's intrusiveness. The balance of the public interest in conducting the surveys against the workers' interest in personal privacy and security should, therefore, swing in favor of the individual. Consequently, in *Delgado*, as in *Brignoni-Ponce*, particularized suspicion of misconduct should have been required to justify the interference with the individual's rights. Where no such suspicion is demonstrated, as is the case with the factory raid process, the procedure should be invalidated as violative of the fourth amendment.

Because the factors the Court used to distinguish an unreasonable roving patrol stop from a reasonable checkpoint stop—surprise and excessive official discretion—are present in the factory survey procedure, the surveys seem more clearly analogous to the roving patrols than to the

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225. *Brignoni-Ponce*, 422 U.S. at 884.

226. *Martinez-Fuerte*, 428 U.S. at 558.

227. *Id.* at 559.

228. *Delgado*, 104 S. Ct. at 1770 (Brennan, J., dissenting in part) (quoting Appellant's Brief at 121 (testimony of respondent Miramontes)).

fixed checkpoint stops. Therefore, the Court should, under *Brignoni-Ponce*, have found the surveys in *Delgado* to be unreasonable under the fourth amendment in the absence of articulable suspicion of individual misconduct. Assuming arguendo that the surveys were found to be more similar to the checkpoint stops than to the roving patrols, however, the reasoning by which the Court upheld the stops at the fixed checkpoints would be insufficient to justify the detentions in the case at hand. The *Martinez-Fuerte* Court's rationale for allowing the checkpoint stops was based in large part upon its recognition that the expectation of privacy in one's automobile, which is relatively open to public view, is significantly less than that in one's home.<sup>229</sup> The Court has, however, acknowledged a meaningful expectation of privacy in one's workplace, even if shared with other employees.<sup>230</sup> The workers in this case were interrogated in their place of business, which was open to other employees but was not within public view. Thus the intrusion they suffered as a result of the INS surveys was substantially greater than that suffered by motorists stopped by the Border Patrol. Under the *Martinez-Fuerte* balancing test, therefore, the intrusion upon the individual workers' rights seems to outweigh the government's interest in conducting the surveys. This compels the conclusion that the survey procedure is unreasonable under the fourth amendment.

## 2. Analysis as investigative interrogation

Analyzing the factory surveys not as border stops but as investigative interrogations, in the mold of *Brown*, *Mendenhall* and *Royer*, also compels the conclusion that the surveys were unreasonable. Under this analysis, whether the fourth amendment is implicated by a particular encounter depends primarily upon the state of mind of the questioned individual; that is, upon whether the circumstances surrounding the questioning were such that a reasonable person in the same position would have believed that he was not free to leave.<sup>231</sup>

Although police questioning does not in itself constitute fourth amendment seizure, a questioned individual may in fact be seized when certain factors are present to produce a reasonable belief that an answer will be compelled.<sup>232</sup> Among the factors considered by the Court to indicate a seizure are "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the

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229. *Martinez-Fuerte*, 428 U.S. at 561.

230. See *Mancusi v. Deforte*, 392 U.S. 364 (1968).

231. *United States v. Mendenhall*, 446 U.S. 544, 554 (1983).

232. *Id.*

citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."<sup>233</sup>

Many of these factors were present in *Delgado*. The record discloses that a large number of agents, generally between fifteen and twenty-five per factory, were employed in each survey.<sup>234</sup> The agents carried weapons, although these were not drawn.<sup>235</sup> Handcuffs were used to detain those workers who were suspected of being illegal aliens.<sup>236</sup> At least one of the workers, respondent Labontes, was physically touched by the agents performing the interrogation.<sup>237</sup> The workers commonly observed detained co-workers being handcuffed and led to a van outside the factory.<sup>238</sup> All of these factors, coupled with the methodical execution of the survey—in which agents proceed down the rows of workers, flash their badges and ask pointed questions<sup>239</sup>—and the large number of arrests made in each factory,<sup>240</sup> added up to an environment in which a reasonable person would have believed that he was not free to leave.

Moreover, the presence of the agents at the doors of the factory could only have made workers feel that their liberty was restrained. Despite the Court's insistence that the "obvious purpose" of these agents' positioning was "to insure that all persons in the factories were questioned,"<sup>241</sup> logic requires the recognition that such insurance could be obtained only by detaining on the premises those workers who had not yet been questioned. Indeed, the trial court found that the agents were stationed at the entrances and exits "in order to prevent persons from leaving the workplace"<sup>242</sup>—a finding which, on appeal, was accepted by all the parties when they agreed that no material facts were in dispute.<sup>243</sup> Thus, the majority Justices' reinterpretation of the purpose of the agents at the factory doors seems procedurally improper.

Even assuming that the Court properly reconsidered this factual issue, however, it should not have focused upon the INS' subjective intent in placing agents at the doors. Instead, the Court should have examined

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233. *Id.*

234. *Delgado*, 104 S. Ct. at 1770 (Brennan, J., dissenting in part).

235. *Id.* at 1760.

236. *Id.* at 1770 (Brennan, J., dissenting in part).

237. The agent approached Labontes from behind, tapped her on the shoulder, and asked her where her papers were. *Id.* (Brennan, J., dissenting in part).

238. *Id.* (Brennan, J., dissenting in part).

239. *Id.* (Brennan, J., dissenting in part).

240. See *supra* notes 14 & 122 and accompanying text.

241. *Delgado*, 104 S. Ct. at 1763.

242. *International Ladies' Garment Workers' Union v. Sureck*, 681 F.2d 624, 626-27 (9th Cir. 1982), *rev'd sub nom.* *INS v. Delgado*, 104 S. Ct. 1758 (1984).

243. *Id.* at 629.

the inferences a reasonable person would draw when observing the agents so positioned.<sup>244</sup> Given the other circumstances outlined above and the psychological environment these factors must have created, it seems clear that a reasonable worker might well have believed that the agents at the exits were there to prevent workers from leaving the area.

The manner in which the Court applied the *Mendenhall* "reasonable belief" analysis seems inappropriate in other respects as well. The *Delgado* Court stated:

The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory. This conduct should have given respondents no reason to believe that they would be detained if they gave *truthful* answers to the questions put to them or if they simply refused to answer. . . .

. . . Since *most* workers could have had no reasonable fear that they would be detained upon leaving, we conclude that the work forces as a whole were not seized.<sup>245</sup>

This language is problematic in two respects. First, to assert that no seizure occurs when an individual is capable of ending the police contact by giving a *truthful* answer is to say that the fourth amendment protects only the *guilty*; that is, the fourth amendment is never implicated when an innocent person is interrogated, as he can extricate himself from the interrogation simply by telling the truth. Alternatively, to require that a worker give a truthful answer in order to be left alone is to require that he be able to show himself to be free of all wrongdoing in order to assert his rights. This is to imply that the fourth amendment protects only the *innocent*. For the Supreme Court to so limit an individual's constitutional freedoms, even by implication through a curious turn of phrase, is a chilling development clearly unsupported by the precedents cited in the *Delgado* majority opinion.

Finally, the reasonableness of an investigative interrogation—like the reasonableness of a Border Patrol stop—depends upon a balance between the public interest in the interrogation and the interference it causes with the individual's freedom. As the Court in *Brown v. Texas*<sup>246</sup> stated:

The reasonableness of seizures that are less intrusive than a

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244. See *supra* note 142 and accompanying text.

245. *Delgado*, 104 S. Ct. at 1763-64 (emphasis added).

246. 443 U.S. 47 (1979).

traditional arrest depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." . . . In the absence of any basis for suspecting [an individual] of misconduct, the balance between the public interest and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference.<sup>247</sup>

The powerful societal interest in certain types of investigative stops, however, does not affect the mandate of the fourth amendment. The Texas statute under which the defendant in *Brown* was required to identify himself was "designed to advance a weighty social objective in large metropolitan centers: prevention of crime."<sup>248</sup> Similarly, the federal statute which purports to grant to INS agents the authority to question without a warrant those persons whom they have reason to believe are illegal aliens<sup>249</sup> is designed to facilitate the monumental objective of checking the tide of illegal aliens entering this country. But as the Court reasoned in *Brown*:

[E]ven assuming that [the avowed social] purpose is served to some degree by stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity, the guarantees of the Fourth Amendment do not allow it. When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practice exceeds tolerable limits.<sup>250</sup>

Because the INS' questioning of individual workers was based upon no objective criteria, this language is as easily applied to the facts of *Delgado* as to those of *Brown*. Because neither of the warrants in *Delgado* purporting to justify the factory surveys named individual workers suspected of being illegal aliens nor contained specific facts giving rise to a suspicion of misconduct on the part of any particular worker, the risk of abuse which the *Brown* Court warned against can only be presumed to have been excessively high.

## VI. CONCLUSION

As has been demonstrated, the factory surveys at issue in *Delgado* were unreasonable under any relevant analysis. That they were nonethe-

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247. *Id.* at 50-52 (quoting *Pennsylvania v. Mimms*, 434 U.S. 106 (1977)).

248. *Id.* at 52.

249. See *supra* note 193.

250. *Brown*, 443 U.S. at 52.

less upheld would imply that the Court was determined to reach a particular conclusion and therefore did so, contrary precedent notwithstanding. Given the magnitude of the problems currently plaguing immigration authorities, it seems fair to assume that the Court ruled as it did in *Delgado* because it wished to facilitate immigration law enforcement procedures to the fullest. However, to serve that undeniably legitimate end by means of an intellectually dishonest misapplication of legal precedents and an unwarranted, effectively racist restriction of constitutional protection is to misuse the Court's power and authority.

The Supreme Court's decision in *Delgado* clearly indicates a willingness on the part of a majority of the Justices to sacrifice the constitutional rights of citizens and aliens alike in an effort to strengthen this nation's flawed immigration law enforcement system. This willingness may flow from the Justices' belief that they can effectively cure the system's ills at a lesser cost and in a shorter time than could Congress. Whatever its motivation, however, the *Delgado* ruling will have the effect of placing the entire burden of immigration law enforcement upon the privacy and personal security interests of citizens and lawful resident aliens of Mexican descent. No matter how noble or pragmatic the intent, such an outcome is unjustifiable.

One of the raids at issue in *Delgado* was not supported by a warrant but was conducted pursuant to the factory owner's consent. Under present federal law, that factory owner bore no liability whatsoever for having hired illegal aliens. Only the workers themselves were subject to prosecution by immigration authorities. Still, the factory owner was allowed to waive the workers' objections to the unreasonable intrusion of a warrantless INS raid. This result, unsupportable under any of the Court's previous decisions, was accepted without comment.

It is not the proper function of the Court to issue legally unsupportable rulings so as to strengthen ineffective legislation. Rather, Congress must act to reform or replace its own impotent laws. Unless and until Congress enacts legislation to impose sanctions upon the employers who currently profit by hiring illegal aliens at miniscule wages, but who are not subject to liability for having induced those aliens to cross the border, this ineffectual, unjust and ethnically biased current immigration law system seems likely to continue. With such a powerful entity as the highest court in the land advocating and actively supporting this system's perpetuation, the injustices inherent in our present immigration policy can only

become more firmly and irretrievably entrenched within our laws and our national consciousness.

*Meghan Kathleen Dooner*